Supreme Court, U.S.
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Supreme Court of the United States

OCTOBER TERM 1995

ESPERANZA RODRIGUEZ DE CASTRO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED

1. For purposes of exercising *in rem* jurisdiction over foreign bank accounts seized by a foreign government in aid of an *in rem* civil forfeiture proceeding filed in United States District Court, is the District Court's requisite "control" of the *res* established by the mere possibility that the foreign government, within its own discretion, might repatriate a portion of the *res* should the foreign government confiscate the funds pursuant to a judgment of forfeiture obtained in the District Court?

2. If it appears that "control" of only a portion of the *res* has been established, may the District Court nonetheless exercise jurisdiction over the entirety of the *res*?

LIST OF PARTIES

The parties to this action are listed in the caption of the case.

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No. 95-_____

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ESPERANZA RODRIGUEZ DE CASTRO,

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v.

UNITED STATES OF AMERICA,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Esperanza Rodriguez de Castro respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit dated August 10, 1995. Rehearing was denied October 19, 1995.

CITATION OF OPINIONS BELOW

The opinion of the District Court is annexed at 1c and has been published. *United States v. All Funds*, 856 F.Supp. 759 (E.D.N.Y. 1994).

The opinion of the Second Circuit Court of Appeals is annexed at 1a and has been published. *United States v. All Funds*, 63 F.3d 148 (2d Cir. 1995).

STATEMENT OF JURISDICTION AND TIMELINESS

This Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C. § 1254(1). This Petition is being filed within 90 days of the circuit court's denial of Petitioner's Motion for Rehearing, dated October 19, 1995 (1b).

CONSTITUTIONAL AND OTHER PROVISIONS INVOLVED

28 U.S.C. § 1355 (b) provides:

(b)(1) A forfeiture action or proceeding may be brought in --

(A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or

(B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.

> (2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District [C]ourt for the District of Columbia.

The Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Ireland Concerning the Investigation of Drug Trafficking Offenses and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, February 9, 1988, U.S.-U.K., 1989 WL 428726, ("Treaty") Article 10(1) provides:

> (1) To the extent permitted by their respective laws, the Parties shall assist each other in proceedings involving the freezing, seizure or forfeiture of the proceeds and instrumentalities of drug trafficking and in relation to proceedings involving the imposition of fines.

Article 10(3) of the Treaty provides:

> (3) A Requested Party in control of forfeited proceeds or instrumentalities shall dispose of them according to its laws. Either Party may transfer forfeited assets, or the proceeds of their sale to the other Party, to the extent permitted by their respective laws, upon such terms as may be agreed.

The Drug Trafficking Offenses Act (England & Wales), Schedule 3, § 12(7) provides:

> Any sums remaining after all the payments required to be made under the foregoing provisions of this section have been made shall be paid into the Consolidated Fund.

The Drug Trafficking Offenses Act (England & Wales), Schedule 3, § 26A (1) provides:

> On an application made by or on behalf of the government of a designated country, the High Court may register an external confiscation order made there if-
> (a) it is satisfied that at the time of registration the order is in force and not subject to appeal;
> (b) it is satisfied, where the person against whom the order is in force is made did not appear in the proceedings, that he received notice of the proceedings in sufficient time to enable him to defend them; and
> (c) it is of the opinion that enforcing the order in England and Wales would not be contrary to the interests of justice.

STATEMENT OF THE CASE

In July 1990, the United States government asked British authorities to restrain funds in various bank accounts in London, England, in anticipation of a criminal prosecution against alleged Colombian drug dealer Jose Santacruz Londoño. The request was made pursuant to (1) the Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Ireland Concerning the Investigation of Drug Trafficking Offenses and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, February 9, 1988, U.S.-U.K., 1989 WL 428726 (Treaty); and (2) the Drug Trafficking Offenses Act of 1986 (Designated Countries and Territories) Order 1990. The accounts, held in the name of claimant or her late husband, were alleged to be proceeds of Mr. Londoño's illicit activities. The request was granted, by order dated July 30, 1990, from England's High Court of Justice.

When the United States government's inability to bring Londoño to the United States to answer criminal charges became apparent, the instant action was commenced. To this end, the government filed a Verified Complaint *In Rem*, dated July 16, 1993, in the United States District Court for the Eastern District of New York, seeking forfeiture of these same bank accounts, under 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6). A

Warrant for Arrest of Article *In Rem* followed on July 19, 1993.

A Verified Notice of Claim was timely filed by claimant-appellant on October 1, 1993, followed by a Motion to Dismiss Verified Complaint *In Rem* on November 1, 1993. The Motion to Dismiss argued that the District Court lacked "control" of the seized funds sufficient to confer *in rem* jurisdiction on the District Court, because the funds, if eventually confiscated by England pursuant to a final judgment of forfeiture by the District Court, would be deposited into England's General Fund, and a portion (if anything at all) given to the United States at the sole discretion of the British authorities.

Proceedings in the district court were held in abeyance until parallel proceedings pending in the High Court of Justice in London, England, seeking vacatur of the 1990 restraint order, were concluded. Following entry of the High Court's Unrevised Judgment of March 18, 1994 denying vacatur, the district court denied Claimant's Motion to Dismiss, and ordered the case to proceed to trial. Claimant filed her Answer April 6, 1994. In lieu of responding to the government's interrogatories, however, Claimant informed the district court by a letter dated May 6, 1994 that she chose not to oppose the government's Motion for Summary Judgment on the Grounds of Collateral Estoppel, but preserved for appeal the issues raised in the district court. The District Court thereafter

filed a Final Judgment and Decree of Forfeiture on May 12, 1994, followed by an amended version of the same on May 17, 1994, and finally by a second amended version of the same on May 24, 1994. The District Court also issued a written opinion (1c). A timely appeal was filed in the United States Court of Appeals for the Second Circuit.

THE OPINIONS BELOW

A. The District Court's Opinion

The District Court, in a written opinion dated July 8, 1994, explained its reasons for finding that the Eastern District of New York exercised *in rem* jurisdiction of the subject bank accounts. The court agreed that it must exercise at least constructive control of the foreign *res* to have *in rem* jurisdiction,[1] but found such control to exist, by virtue of the assistance provided by Great Britain in aid of this proceeding:

> There is little doubt that Great Britain is cooperating with federal prosecutors. Thus, it may be deemed, for this purpose, to be acting as an agent of the United States, giving the lat[t]er and this court constructive possession. Seizure of the accounts in Great Britain with the assistance of the British

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1 Claimant did not contest that the district court properly exercised subject matter jurisdiction of the action and that venue was proper pursuant to the 1992 amendments to 28 U.S.C. § 1355.

> government gave this court constructive control over the defendant funds. The opinion of the English High Court gives assurance that a judgment of forfeiture issued by this court would be enforced in England.

(9c-10c).

B. The Circuit Court's Opinion

The Circuit Court affirmed the District Court's judgment. Along the way, it first rejected the government's argument that, under the amendments to 28 U.S.C. § 1355, control of a foreign *res* was not a requisite to *in rem* jurisdiction:

> Although Congress certainly intended to streamline civil forfeiture proceedings by amending § 1355, even with respect to property located in foreign countries, we do not believe that Congress intended to fundamentally alter well-settled law regarding *in rem* jurisdiction. The Supreme court has recently affirmed the rule that "'in order to institute and perfect proceedings *in rem* ... the thing should be actually or constructively within the reach of the Court.'" *United States v. James Daniel Good Real Property*, 114 S.Ct. 492, 503 (1993) (quoting *The Brig Ann*, 13 U.S. (9 Cranch) 289, 291 (1815)).

* * *

> ... Therefore, we conclude that in order to initiate a forfeiture proceeding against property located in a foreign country, the property must be within the actual or constructive control of the district court in which the action is commenced.

(10a-11a).

The court acknowledged that the applicable Treaty, read together with pertinent British Law, provided that, if and when a final judgment of the Eastern District of New York were registered and executed upon in the United Kingdom, "any net sums remaining after payment of certain specified sums 'shall be paid into the Consolidated Fund,' which is essentially a general treasury ... [and that] the United Kingdom has the power to retain any funds seized and that the amount that the United States will receive ultimately will depend on negotiations between the two nations" (12a-13a, *citing* The Agreement Between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Ireland Concerning the Investigation of Drug Trafficking Offenses and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, February 9, 1988, U.S.-U.K., 1989 WL 428726 (Treaty), Arts. 10(1) and 10(3); Drug Trafficking Offenses Act, Schedule 3 § 12(7); *id.*, Schedule 3, § 26A). Nonetheless, the court concluded

that the district court "had constructive control of the funds by virtue of the demonstrated cooperation of the British government pursuant to the 1988 Treaty and the Drug Trafficking Offenses Act." (13a). This cooperation, said the court, included the issuance of the 1990 restraining order; the assistance of British law enforcement officials in serving copies of the forfeiture complaint and warrant on the subject banks; and the 1994 Order of the High Court continuing the restraining order (13a). The court also cited the government's representation on appeal that the British government, in at least two past instances, had turned over a portion of forfeited funds.

Based on the foregoing analysis, the Second Circuit concluded that "the United Kingdom acted essentially as an agent of the United States for purposes of this forfeiture action" and that the government had "met its burden of demonstrating that the British government will turn over at least a portion of the seized funds to the United States, thereby vesting the district court with the requisite constructive control of the funds" (14a).

REASONS FOR GRANTING THE WRIT

The instant Petition addresses bedrock principles of jurisdiction in the federal courts, concerning which this Court has shown a heightened interest of late. The serious and fundamental errors made by the lower courts in concluding that the district court enjoyed *in rem* jurisdiction

over the entirety of the subject accounts, when in fact it did not, demonstrates a continuing need for this Court to address issues of jurisdiction. This need is particularly acute because similar seizures of funds in foreign accounts will occur with increasing frequency, in light of the amendments of 28 U.S.C. § 1355 granting subject matter jurisdiction over forfeiture actions against property located outside the United States. Clarification is required regarding when a district court has "control" of foreign property sufficient to imbue it with *in rem* jurisdiction.

This Court has repeatedly affirmed that control of a *res* -- constructive or actual -- is a prerequisite to *in rem* jurisdiction in a forfeiture action. As stated most recently, in *United States v. James Daniel Good Real Property*, 114 S.Ct. 492 (1993), what is required "in order to institute and perfect proceedings *in rem*, [is] that the thing should be actually or constructively within the reach of the Court." *Id.* at 503, *quoting The Brig Ann*, 13 U.S. (9 Cranch) 289 (1915). A year previous, the Court said: "[c]ertainly, it long has been established that a valid seizure of the res is a prerequisite to the *initiation* of an *in rem* forfeiture proceeding." *Republic National Bank of Miami v. United States*, 113 S.Ct. 554 (1992).

The Court of Appeals acknowledged this principle, but found that "constructive control" of the bank accounts had been achieved because "the government has met its burden of demonstrating that the British government will

turn over at least a portion of the seized funds to the United States." (14a). This conclusion raises two distinct questions deserving of this Court's consideration. *First*, is constructive control of a *res* achieved where there exists merely a possibility that a foreign government will exercise its unreviewable discretion to repatriate a portion of the *res*? *Second*, if there exists a likelihood only that a *portion* of a *res* will be repatriated, does the district court nonetheless enjoy *in rem* jurisdiction of the *entire res*?

A. Constructive Control of the Bank Accounts did not Exist, in Whole or in Part.

The rulings of the courts below, that "constructive control" of the subject accounts exists, suggests that those courts applied a definition of "constructive control" entirely at odds with its traditional meaning. Constructive control, like constructive possession, exists "when a person ... knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others." *United States v. Gordils*, 962 F.2d 64, 71 (2d Cir. 1992). *See also United States v. Torres*, 901 F.2d 205, 243 (2d Cir. 1990) (concerning constructive possession of drugs); *United States v. Aiello*, 864 F.2d 257, 263 (2d Cir. 1988) ("constructive possession exists when a person ... knowingly has the power and the intention at a given time to exercise dominion and control over an object ..."). Similar principles apply in other areas of law, for example in bankruptcy jurisprudence, where the

test for constructive possession is "one of uninhibited control -- whether the one who holds the property does so subject to another's demand." *In Re Nat. Hosp. & Institutional Builders Co.*, 38 B.R. 727 (D.C. 1984). *See also Buss v. Long Island Storage Warehouse Co.*, 64 F.2d 338 (2d Cir. 1933).

Constructive control therefore exists where a court does not *presently* possess or control certain property, but nonetheless has the power to do so *at his or her discretion.* In no case of which we are aware has a court held that constructive control exists merely because another party, who *actually* controls the property, may, at his or her discretion, yield control to another.

Under the traditional definition of "constructive control," the District Court certainly lacked *in rem* jurisdiction. It had no ability to control the funds and therefore was entirely at the mercy of the British government. The conclusion by the Second Circuit that the requisite control exists is based on the following two propositions: (1) the various orders entered in this case by the British courts and law enforcement officials have been in direct response to requests from federal authorities; and (2) the British, on two previous occasions, have delivered a portion of confiscated funds to the United States. From these two propositions, the court concluded there was a likelihood that at least a portion of any confiscated proceeds

would be transferred from England's General Fund to the United States.

The first cited proposition provides no evidence at all supporting the conclusion that the District Court had constructive control of the funds, as the U.S. forfeiture proceedings are the *only* means by which a confiscation of these funds may eventually be achieved -- whether for the benefit of Britain, the United States, or both. Thus, whether the British intend to keep the funds all for themselves, or turn a portion over to the United States, it has no choice but to act in aid of the present forfeiture proceeding; such assistance therefore is as consistent with an intention of the British to confiscate the funds for their own use as for ours.

The Court of Appeals' reliance on two instances when the British have supposedly turned over a portion of confiscated proceeds to the United States was misplaced. No evidence in the record reflects the number of confiscations that have occurred in Britain versus the number of instances when money was repatriated. Thus, the existence of two such instances, in isolation, hardly supports the Second Circuit's conclusion that the government has "met its burden of demonstrating that the British government will turn over at least a portion of the seized funds to the United States." Indeed, the facts of these two cases are not even explicated in the record or in

the Second Circuit's opinion, so their usefulness in assessing Britain's intention in this case is non-existent.[2]

If the government were truly confident that a portion of the funds would be repatriated, the obvious route for the government to have followed would have been to seek written assurance from the British government that this would occur. The government's failure to make such efforts (or at least to bring them to Claimant's and the district court's attention) is far more revealing than the government's vague reliance on two hand-picked cases.

Rather than demonstrate that the district court enjoyed constructive control of the subject bank accounts, the evidence established that no such control existed. The Court of Appeals ruled to the contrary because it applied a definition of constructive control at odds with the meaning of that term, as interpreted both by this Court and by the lower courts.

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2 Further, the government made this representation without supporting citation to the record and it therefore should not have been before the court. Claimant explicitly objected to its use, Reply Brief at 4, n.3.

B. Assurance that a Portion of the Res would be Repatriated would, at Most, Support the District Court's In Rem Jurisdiction over that Portion Alone.

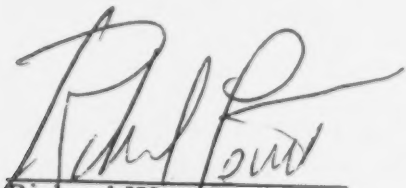
The Second Circuit found a likelihood that a *portion* of the seized moneys would be repatriated, but without explanation ruled that this likelihood permitted the district court to exercise *in rem* jurisdiction over *all* the funds. This conclusion finds no support either in logic or law. If, as both the district court and the Second Circuit agree, control of the *res* is a prerequisite to *in rem* jurisdiction, then such jurisdiction may exist only with respect to that property which in fact is controlled by the district court, either actually or constructively. The Second Circuit's opinion thus violates the very rule of jurisdiction it adopted in its decision, permitting the district court to exercise jurisdiction over substantial funds that by no theory were under the control -- actual or constructive -- of the District Court.

CONCLUSION

The issues presented here for review by this Court are likely to be raised often in the future, as more *in rem* forfeiture proceedings are brought against foreign property pursuant to the amendments to 28 U.S.C. § 1355. Accordingly, the need for an early resolution of this and related issues is great. We therefore respectfully request that this Petition for a Writ of Certiorari be granted.

Dated: New York, New York
January 11, 1996

Respectfully submitted,



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